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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 1 5 2010
SRC 09 021 52457

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral fellow at Clemson University, Clemson, South Carolina. U.S. Citizenship and Immigration Services (USCIS) records indicate that he now works at Washington University, St. Louis, Missouri. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, a new witness letter, and copies of materials already in the record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on October 29, 2008. Counsel described the petitioner's area of endeavor:

> [The petitioner] has been conducting research in computational electromagnetic, electromagnetic compatibility . . . , printed circuit board design, and automotive electronics design. In the course of his career, [the petitioner] has exhibited considerable expertise in this field and made major contributions.

> Perhaps the most significant example of [the petitioner's] many contributions is his development of a LU recombination method to improve the performance of boundary element methods at low frequencies. . . . His method greatly reduces the complexity when analyzing electromagnetic problems in both low and high-frequency range.

Several witness letters accompanied the initial filing of the petition. [redacted] stated:

> [The petitioner] is currently working under my direction as a post-doctoral researcher in the Clemson Vehicular Electronics Laboratory. I have known [the petitioner] since 2001 when he joined my group as a Ph.D. candidate at the University of Missouri-Rolla. . . . He has played a key or leading role in each project he has been a part of in my program. . . . He is a top researcher in the area of electromagnetics and I expect him to continue to produce great breakthrough works in the future.
>
> . . . [The petitioner's] research work yielded a major breakthrough in the application of full-wave electromagnetic modeling techniques at low frequencies. . . . This cutting-edge research plays and will continually play a vital role in the development of improved numerical modeling tools to provide a more sophisticated and diverse range of services. . . .
>
> [The petitioner] has been working on several projects at Clemson and has cultivated a number of successes. For example, [the petitioner] works with several students on a project supported by the US Army Research Office to evaluate and document the state-of-the-art in numerical electromagnetic modeling software. With his profound knowledge and expertise in computational methods, he efficiently directs the students' work, which has already yielded fruitful results.

[redacted] who "started to collaborate on a research project" with the petitioner after meeting the petitioner "through his advisor [redacted]" stated that a 2006 paper in which the petitioner "proposed a new original method of calculating static charge distribution . . . was a major contribution to the analysis of low frequency magnetic field and numerical modeling of electromagnetics."

[redacted] of Missouri University of Science and Technology (MST), formerly the University of Missouri-Rolla, served on the beneficiary's doctoral dissertation committee and collaborated with him on various projects. [redacted] stated that the beneficiary "is on his way to becoming a top researcher in this field," having "conceived and developed a unique mathematical formulation to improve the performance of different types of numerical electromagnetic tools at low frequencies."

[redacted] stated: "As I joined Missouri University of Science and Technology after [the petitioner] left, I did not get a chance to work with him directly, though I have been highly impressed with his published works." According to [redacted] *curriculum vitae* in the record, [redacted] attended Tsinghua University from 1989 to 1997; the petitioner attended the same university from 1993 to 2001. Also, [redacted] studied at MST from 1997 to 2000, and collaborated with [redacted] during that time, before leaving MST in 2000 and returning in 2007.

[redacted] stated that the petitioner "has made significant contributions in the field of numerical electromagnetic techniques and their applications to complex and challenging problems, such as the practical printed circuit board design. What impressed me most is . . . [the petitioner's] LU recombination method."

[redacted] of the University of Mississippi, who served with [redacted] on the editorial board of the *Applied Computational Electronics Society Journal*, stated:

> Although I do not know [the petitioner] personally, I have read his papers on the subject of full-wave modeling. . . . I am impressed by [the petitioner's] research and his great achievements in the improvement of full-wave modeling techniques. . . . His work addressed the low-frequency instability, which is an inherent limit of most boundary element methods. As I know, [the petitioner] is the first to solve the problem in a post-processing manner. . . . This property enables simplified incorporation of [the petitioner's] improved method into a variety of applications without affecting their performance at high frequency.

[redacted] of Florida International University stated:

> [The petitioner's] contributions regarding electromagnetic modeling techniques are quite significant and impressive. I got to know of his research when I served as the chairman of [the] 2006 Applied Computational Electromagnetic Society Conference. I had the honor to present the 2006 Best Paper Award to [the petitioner] for his paper regarding low-frequency boundary element techniques. . . . Out of 34 papers eligible for this award, [the petitioner's] stood out as the best based on the criteria of scientific excellence.
>
> . . . [The petitioner's] method undoubtedly is a great advance for the development of computational tools in electromagnetics, and has wide applications with the rapid development of new electronic products and techniques.

[redacted] of the National University of Singapore, also a laboratory director at the Institute of High Performance Computing, stated:

> I knew about [the petitioner's] work initially through reading and reviewing a couple of his scientific papers, and thereafter we had interacted at [a] number of international

> conferences and meetings. . . . Very recently, I attended his presentation at the 2008 IEEE International Symposium on Electromagnetic [C]ompatibility. . . . I would highlight that his presentation is great where he presented his recent research work on benchmark studies of the key computational electromagnetic techniques. His research findings definitely have a great impact on various industries including micro/nano-electronic industry, automotive, aerospace and communication industries.

The witnesses have praised the broad applications of the petitioner's method, but the record does not establish that the petitioner's method is, in fact, in wide use or has gained significant recognition outside of conferences where the petitioner presented his work. The petitioner submitted copies of his own published and presented work, but no evidence to show the extent, if any, to which other researchers have cited that work.

The director denied the petition on April 30, 2009. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had not shown that he "has accomplished anything more significant than other capable members of their profession holding similar credentials and conducting similar work."

On appeal, the petitioner submits a witness letter prepared in October 2008, but not included in the initial filing of the petition. [redacted] of the University of Illinois at Urbana-Champaign stated that the petitioner's "technique opens another way to analyze the low-frequency problem" and that the petitioner's "research in the development of EM modeling techniques holds great technological merit." The letter is, overall, similar to previously submitted letters, and as such it adds little to the record.

Counsel's appellate brief consists primarily of a discussion of the petitioner's initial submission. Counsel asserts that the petitioner's "innovative LU recombination method . . . has **inspired and influenced the work of several non-affiliated researchers**" (emphasis in original). The petitioner has been able to locate witnesses who attest to the significance of his work, but the record contains no evidence of the implementation of his ostensibly ground-breaking methods, either in theory (through independent citation of his published work) or in practice (through new research or manufacturing techniques adopted on a significant scale from his work). Unless we make the indefensible finding that the job offer/labor certification requirement applies only to researchers whose work has been completely devoid of any influence, it cannot suffice for the petitioner to produce a handful of anecdotal accounts of how his work has been of use to other researchers.

Counsel asserts that the director did not give sufficient weight to the petitioner's "receipt of a Best Paper Award from the Applied Computational Electromagnetics Society." Counsel has asserted that this was "a major award," but the assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, under 8 C.F.R. § 204.5(k)(3)(ii)(F), institutional recognition such as the Best Paper Award amounts to part, but not all, of a successful claim of exceptional ability in the sciences. As we have noted, aliens of exceptional ability in the sciences, including award recipients, are typically subject to the job offer/labor certification requirement. Therefore, a fragment of an exceptional ability claim is not presumptive evidence that the petitioner qualifies for the waiver, which is a special benefit over and above the underlying classification.

Upon consideration of the evidence presented, we find that the petitioner has failed to submit objective documentation to support the subjective claims of witnesses whom the petitioner has selected to support his petition. With time, the witnesses may well be proven right in their confidence of the petitioner's promise, but the record does not show that the petitioner had had a significant impact on his field at the time he filed the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.